Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JAMES L. WORTHINGTON

Petitioner

v.

DANIEL GLICKMAN, Secretary
United States Department of
Agriculture

Respondent

On Petition for Writ of Certiorari
To the Ninth Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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44 pp

Does the APA provide veterans with their due process of law for property rights guaranteed by the U.S. Constitution and judicial review for "legal wrongs" [statutory violations] when the Office of Special Counsel ("OSC") defers their investigative authority of prohibited activity to the agency's administrative procedures as authorized by Title 5 U.S.C. § 1206(e)(2) and the MSPB does not have jurisdiction?

When the OSC defers their investigative authority of prohibited activity to an agency's administrative procedures, is or is not, that the same permission under the CSRA for affected employees to appeal evidenced legal wrongs and constitutional violations to a District Court under the Administrative Procedure Act ("APA") as the same permission for issues of discrimination to be appealed to a District Court under the Civil Rights Act?

When an agency holds in abeyance its investigation into a complaint based on merits, until after completion of the discrimination complaint on the same action, what is the final agency decision subject to review under the APA?

After a defendant objects to one trial and agrees to two trials as authorized by rule 42 F.R.C.P. (separate or consolidated), for two concurrently filed civil actions, has the defendant waived his rights to declare res judicata as found by the District Court?

What effect does Title 38 U.S.C. § 4324 (Oct 1994) have with respect to jurisdiction to the MSPB for veteran's employment and reemployment rights, for a prior action?

Did the Judges involved in this case violate their oath of office to support the U.S. Constitution and laws, by denying due process of law to a person with a cognizable property right?

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OPINIONS BELOW

On October 13, 1995, the District Court for the Eastern District of California entered the decision for CIV S-94-1358 WBS/GGH, that this petitoner prays that the Supreme Court will review. The District Court dismissed this Civil action because of a lack of jurisdiction. The Court asserts that the Civil Service Reform Act ("CSRA") is the exclusive appeal procedures for federal employees. The Court further dismissed because of a question of timeliness, but also found that this civil action may in fact be timely, within the Statute of Limitations. The District Court also found that the defendant had waived there rights to assert res judicata and that "res judicata" did not apply to this case.

On July 15, 1996, the United States Court of Appeals for the Ninth Circuit, issued its decision for CASE NO. 95-17208, and affirmed the decision to dismiss for lack of jurisdiction. They also asserted that the CSRA was the "exclusive" appeals procedure for federal employees. This Appeals Court did not address the issue of timeliness. This Appeals Court Affirmed dismissal and res judicata.

On December 18, 1996, the United States Court of Appeals for the Ninth Circuit denied the petition for rehearing.

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals was entered on December 18, 1996. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves "due process of law" for a cognizable property right [Title 5 U.S.C. 3502(c)], guaranteed by the U.S. Constitution, Amendment V. This Amendment states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES

Title 5 U.S.C. § 702. Right of Review.

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof".

Title 5 U.S.C. § 704. Actions reviewable.

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except ..."

Title 5 U.S.C. §§ 1206(e)(1)(D & E) & 1206(e)(2) [1978-1989]

Title 5 U.S.C. § 1206(e)

"(1)(A) .....

.....

.....

(D) activites prohibited by any civil service law, rule, or regulation including any activity relating to political intrusion in personnel decision making; and

(E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any prohibited activity".

(2) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraph (1)(D) or (1)(E) of this subsection if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure."

Title 5 U.S.C. § 3301 Rule V § 5.1

"The Director, Office of Personnel Management shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veteran's Preference Act, as reenacted in Title 5 United States Code [now covered by this chapter and chapter 35 of this title]...."

Title 5 U.S.C. § 3502(c)

"(c) An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other competing employees."

Title 5 U.S.C. § 7512, in part:

"This subchapter applies to-
(1) a removal;
(2) ....
(3) ....
(4) ....
(5) ....
but does not apply to-
(A) ----
(B) a reduction-in-force action under section 3502 of this title,
(C) ...."

CODE OF FEDERAL REGULATIONS

Title 5 C.F.R. Part 351.201(a)(2) & (b)

(a)(2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling, reorganization; the exercise of reemployment or restoration rights; or reclassification of an employee's position do to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.

(b) This part does not require an agency to fill a vacant position. However, when an agency, at its discretion chooses to fill a vacancy by an employee who has been reached for release from a competitive level for one of the reasons in paragraph (a)(2) of this section, this part shall be followed.

Title 5 C.F.R. Part 351.901.

> An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction-in-force action may appeal to the Merit Systems Protection Board.

U.S. DEPARTMENT OF AGRICULTURE
REGULATION

Chapter 771 Subchapter 4 Appendix A-4e. EEO Complaints.

> In keeping with the Department's policy to avoid duplicative reviews, a formal grievance on an issue that is encompassed by an EEO complaint will not be processed simultaneously with the EEO complaint. Instead, the official then considering the grievance will inform the grievant that the grievance is being held in abeyance until a final Department decision is reached on the EEO complaint or will return the grievance to the grievant. ..... If the findings on the EEO complaint address the merits of the grievance issue, the grievance may be rejected. If the merits are not addressed, review of the grievance will resume following the final Department decision unless the grievance is not resubmitted by the grievant.

TEXT

Petitioner is a veteran of the U.S. Armed Forces and entitled to all benefits incorporated in Title 5 U.S.C. Section 3502(c). He was reassigned from a GS-802-7 position on the Tahoe National Forest ("N.F.") to a GS-802-9 position on the Angeles N.F. in October 1986. See exhibit 4. As indicated in Ms Geri Bergen's affidavit at exhibit 5, at the time of the reassignment, there was a shortage of funds, lack of work, and reorganization. There was no increase in pay.

Petitioner filed a complaint with the OSC as authorized by the Civil Service Reform Act ("CSRA") concerning the reassignment. After a token phone call to insure that the agency could provide a legitimate discretionary reason for the reassignment, the OSC deferred their investigative authority of prohibited activity to the agency, as authorized by Title 5 U.S.C. Section 1206(e)(2). See the letter from the OSCat exhibit 6.

After the OSC deferred their investigative authority of prohibited activity to the agency's appeal procedures, it became apparent that the reassignment was in direct violation of four (4) different statutes [legal wrongs]. The statutes that were violated are Title 5 U.S.C. §§ 3502(c), 5106(a), 7201, and 3301 Rule 7.1. To summarize the violations, petitioner was unqualified for the promotion into the vacant position that had not been classified in accordance with statute and implementing regulations. Further, petitioner was not offered any entitlement to be retained on the Tahoe N.F. and the promotion worsened the under representation of females at the GS-802-9 level. Since petitioner was unqualified for the promotion to perform the duties of the new position at an acceptable level, he was ultimately removed from the federal service in August 1990 for unacceptable performance.

In Norton v. State, 176 P 347, 349, the court stated that, "entitlement means the granting of a privilege or right to be exercised at the option for whose benefit the word is used upon which no limitation can be arbitrarily imposed."

Even though petitioner did not have appeal rights to the MSPB for his retention preference entitlement, petitioner did appeal to the MSPB and the U.S. Court of Appeals for the Federal Circuit. Petitioner hoped that they could somehow intervene or provide the due process of law that petitioner was entitled to. Confirming the applicable statutes and regulations, the MSPB did not have full coverage jurisdiction for veteran's retention preference entitlement. The MSPB only has jurisdiction for matters appealable to them by a federal rule, regulation, or law. See Title 5 U.S.C. § 1205(a)(1). No rule, regulation, or law authorized the MSPB jurisdiction of

petitioner's entitlement to due process of law for any infraction of Title 5 U.S.C. § 3502(c).

The Director, OPM did grant the MSPB partial jurisdiction over some Title 5 U.S.C. § 3502(c) issues. See Title 5 C.F.R. Part 351.901 (1986). This regulation states in part:

> "An employee who has been furloughed for more than 30 days, separated, or demoted by reduction-in-force action may appeal to the Merit Systems Protection Board."

Since petitioner was not affected by a furlough, nor separated, nor demoted by a RIF, this veteran had no appeal rights to the MSPB for the "shortage of funds, lack of work, or reorganization" action. Where do veterans that are released from an agency because of a shortage of funds, lack of work, or reorganization, without appeal rights to the MSPB, obtain their due process of law?

Congress intended the Veteran's Preference Act ("VPA") as enacted in Title 5 U.S.C. Chapter 35, to be enforced by the Director, Office of Personnel Management ("OPM") and not subject to the provisions of the CSRA. See Title 5 U.S.C. § 3301 Rule 5.1 and Title 5 U.S.C. § 7512(A) whereby Congress excluded section 3502 from the MSPB jurisdiction. In view of § 3301 Rule 5.1, the Director, OPM was required to provide all veterans with a means to obtain due process of law for any questionable issue of Title 5 U.S.C. § 3502. The Director, OPM had the option to leave due process of law for veterans in the District Court under the APA as it had previously been, or the Director could promulgate a regulation and confer due process of law for Chapter 35 issues to the MSPB. The Director, OPM did grant some veterans the right to appeal shortage of funds or lack of work actions to the MSPB [see Title 5 C.F.R. 351.201(a)(2) & .901]. But, left other veterans [this petitioner] that were also affected by a shortage of funds, lack of work, or reorganization action, without appeal rights to the MSPB.

In DeVries v. Crofoot, 111 N.W. 775-777, 148 Mich. 183, the Court stated, "Legal wrong is committed whenever a man is

dispossed of his property against his will". Petitioner in this case has been deprived of his property against his will, a legal wrong. The Tahoe N.F. retained non-veterans in petitioner's grade and occupational series, while releasing this petitioner without offering him any entitlement to retention preference on the Tahoe N.F.. See Ms. Diane Musick's affidavit at exhibit 7, confirming that she was retained on the Tahoe N.F. at the time petitioner was released from the Tahoe N.F..

Title 5 U.S.C. § 3502(c) is a section of the Veteran's Preference Act (VPA) and a property right conferred to veterans. The VPA applies at all establishments, agencies, bureaus, administrations, projects, and departments of the government. Wherever federal funds are dispersed. See Title 5 U.S.C. § 3501(b) and the definition for Executive agencies at Title 5 U.S.C. § 1302(b).

In Hilton v. Sullivan, 334 U.S. 323, (1948) the Supreme Court stated that "as to government employment the retention preference for veterans was absolute", without any condition or encumbrance. In Perry v. Sinderman, 92 S.Ct. 2694 (1972), the Supreme Court stated that, "A person's interest in a governmental benefit is a property right subject to procedural due process protection". In Fitzgerald v. Hampton, 467 F.2d 755, 762 (D.C. Cir. 1972), the Appeals Court stated, "Fitzgerald's employment is under legislative protection. The vehicle is the Veteran's Preference Act". The Court further stated, "we hold that the statutory employment rights of Fitzgerald are within the liberty and property concept of the Fifth Amendment and sufficient for him, as a preference eligible, to invoke the due process clause". In Fischer v. Haeberle, 80 F. Supp 652, 654, the Court stated, "Although the Veteran's Preference Act of 1944 is silent as to judicial review of agency action, the Administrative Procedure Act of 1946 provides for such review".

As found in Devries, Hilton, Perry, Fitzgerald, and Fischer, supra, petitioner in this case has a property right sufficient to invoke the due process of law clause of the U.S. Constitution, Amendment V, with the APA providing the judicial review.

Even though this petitioner has a property right sufficient to invoke the due process of law clause, petitioner has been denied his due process of law, for the subject entitlement.

The U.S. Court of Appeals for the Ninth Circuit has denied this petitioner judicial review for the "legal wrongs" in the agency's final decision, under the APA and or his due process of law for his property right. The Appeals Court stated that the CSRA was the "exclusive" remedy for all federal personnel actions. They cited United States v. Fausto, 484 U.S. 439, Viet v. Heckler, 746, F.2d 508, 510 (9th Cir. 1984), and Brock v. United States, 64 F.2d 829, 832 (9th Cir. 1995).

In view of the conflict between Hilton, Perry, Fitzgerald, and Fischer, whereby all veteran's are entitled to due process of law for the subject property right under the APA, versus the finding in Fausto whereby some veterans are denied due process of law to the MSPB, petitioner prays that the Supreme Court grant this petitioner his Writ of Certiorari and decide if all veterans affected by a shortage of funds, lack of work, or reorganization, are entitled to due process of law for any questionable issue under Title 5 U.S.C. Chapter 35. Did the Director, OPM place some unfair limitations, restrictions, or encumbrances, to deny some veterans due process of law for the subject property right?

Petitioner further prays that the Supreme Court determine who provides the due process of law for veterans that did not have appeal rights to the MSPB. Since this case involves a legal wrong, the statutory appeal procedure for this petitioner should be through the District Court under the APA. Title 5 U.S.C. § 702 states that,

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute, is entitled to judicial review thereof."

Petitioner further prays that the Supreme Court reverses the Ninth Court of Appeals decision, grant jurisdiction for this civil action, and remand back to the appropriate court for further

adjudication, to provide this petitioner with the due process of law that he is entitled to.

ADDITIONAL FACTS AND ISSUES

Petitioner believes the Supreme Court's decision in Fausto was correct to the degree reviewed, but an incomplete decision for this case because of the following differences between this case and Fausto:

1) None of the cites by the Court of Appeals, or the District Court, involved "a cognizable property right sufficient to invoke the due process of law clause", as petitioner in this case does;

2) Of the cases cited by the District Court, none had received a letter from the OSC deferring the investigation to the agency as shown in this case. Further, this petitioner has provided a deposition from Mr. Johnson, [Appell. Informal Brief, Ex.9] under oath, whereby the Office of Special Counsel did not contact him about the duties and qualifications for the subject position on the Angeles N.F.. Mr. Johnson was the key player in establishing the duties that also determines necessary qualifications for the position, yet the OSC did not question him. The OSC did not thoroughly investigate.

3) Fausto was appealing a "personnel action" and there is no statute authorizing judicial review for a "personnel action for federal employees", other than the CSRA, which permitted the Supreme Court to declare the CSRA was the exclusive appeals procedures for federal employees.

Whereas, this case contains "legal wrongs" and their is a statute that entitles any person affected by an agency's legal wrong, to judicial review. See Title 5 U.S.C. § 702.

4) The OSC had not deferred any of the cited cases to the agency's administrative procedures, as they did in this case.

Once the OSC defers its investigative authority to the agency's administrative procedures, the OSC is then prohibited from any further investigation into that prohibited activity. See Title 5 U.S.C. § 1602(e). More importantly, when the OSC under the authority of the CSRA defers to an agency's administrative procedures, the CSRA has in effect, granted permission for judicial review under the APA, if the agency's final decision contains a legal wrong.

Agency actions that are at an agency's discretion are excluded from judicial review under the APA. However, an agency does not have discretion to violate federal statutes. The APA applies whenever an agency's final decision violates a constitutional, statutory, or regulatory command. See Davis Enterprise v. U.S. E.P.A., 877 F.2d 1181 (3rd Cir. 1989), Local 2855 AFGE (AFL-CIO) v. United States, 602 F.2d 574, 580, Kletschka v. Driver, 411 F.2d 436, 437.

In Losure v. Interstate Commerce Commission, 2 MSPB 361, 363, the MSPB has stated that the permissible reasons justifying a RIF are "Shortage of Funds, Lack of Work, and Reorganization". Further, "these regulatory terms have legislative effect giving meaning to the statutory expression "reduction in force" as provided in 5 U.S.C. section 3502(a)....". As implied by the MSPB, and the U.S. Constitution, whenever a veteran is released from an agency because of a shortage of funds, lack of work, or reorganization, the provisions of Title 5 U.S.C. Section 3502(c) [due process of law] can be invoked by the veteran.

Petitioner did not receive Ms. Geri Bergen's affidavit whereby she states that the reasons for petitioner's release from the Tahoe N.F. was because of the shortage of funds, lack of work, and reorganization, until late 1989. Her affidavit was not available at the time of any appeal to the MSPB and or the OSC.

The court costs for Civ-S. No. 92-1020 have been paid.

The agency holds complaints on merits in abeyance, until after completion of discrimination complaints on the same issues. See U.S. Department of Agriculture ("USDA") regulation,

Chapter 771 Subchapter 4 A-4e. Petitioner filed timely complaints with the agency on merits and also on discrimination. The only "final decision" from the agency concerning the reassignment was March 5, 1991. The initial letter regarding the reassignment was only "a preliminary, procedural, or intermediate agency action" not reviewable under the APA. More importantly, it is the "final agency action" that is subject to judicial review under the APA. See Title 5 U.S.C. § 704.

In view of the cited regulations above, petitioner prays that the Supreme Court decide the correct date of the"final agency action" [March 5, 1991] for the reassignment and take appropriate action to reverse the Court's decision. In its decision, the District Court did state that the "Statute of Limitations" may not have ran out for this case. Also, See Abbott Laboratories v. Gardner, 387 US. 136, 18 L.ed 2d 681, whereby the Supreme Court stated that "Judicial Review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

In view of Title 5 U.S.C. 3502(c) [a cognizable property right], Ms. Musick's affidavit that she was retained on the Tahoe N.F., and the U.S. Constitution, Amendment V, are the Judges that denied due process of law to this petitioner, in violation of their oath of office to support the constitution and laws of this country? Especially considering that neither Fausto, nor any other cite by the defendant or the Courts evidenced a cognizable property right as this petitioner does, nor did they evidence legal wrongs as this petitioner has. Even Ryon had agreed to the regulations surrounding his reassignment. He was not dispossessed of his property rights against his will. Further, he did not evidence a legal wrong sufficient for judicial review under the APA.

Further, the OSC under the CSRA, clearly deferred this case to the agency, excluding it from the CSRA and authorizing judicial review under the APA, if the agency's final decision contained a legal wrong. Further, since this case evidences several legal wrongs by the agency, Title 5 U.S.C. § 702

becomes another property right [guaranteeing due process of law] to this petitioner, entitling him to judicial review thereof.

Petitioner had filed a timely complaint concerning the reassignment with the District Court. Civ.S.No. 92-1020. Before that case went to trial, petitioner attempted to amend the initial complaint to include jurisdiction under the APA and non-discriminatory merit issues. The defendent objected to the motion to amend. Petitioner filed this civil action (timely) and the two actions should have been joined or consolidated into one trial as authorized by Rule 42 F.R.C.P.. In view of the fact that the defendant objected to one trial for all issues, the defendant in effect agreed to have two separate trials. The defendant waived his right to have res judicata for one trial have any affect on theother trial. See Calderon Rosado v. General Elec. Circuit breakers, Inc., 805 F.2d 1085 (1st cir. 1986). The District Court disallowed res judicata, in favor of this petitioner. Upon review by the U.S. Court of Appeals for the Ninth Circuit, they affirmed dismissal because of res judicata, even though the defendant had waived his rights to assert res judicata, and in violation of Rule 42 that permits two (2) separate trials or the consolidation of the two civil actions.

Petitioner prays that the Supreme Court resolve the differences between the two courts and affirm the District Courts findings that the defendant had waived his res judicata rights, chose to have two separate trials, and res judicata does not preclude judicial review for this civil action.

Petitioner may not prevail on reduction in force issues. However, if this petitioner is granted his due process of law for the property right that confers due process of law to him, he may prevail on other issues.

The U.S. Court of Appeals for the Ninth Circuit's assertion that petitioner first raised due process of law for the first time was on appeal, is incorrect. It was mentioned in this petitioner's Opposition to the Defendant's Motion for Summary Judgment to Dismiss. In view of the statutory appeal procedure under the APA for legal wrongs and judicial review for veterans, it should not have been necessary to make much ado of the U.S.

Constitution.. It only guarantees this petitioners claim for judicial review that should be under the statutory appeal procedure established under Title 5 U.S.C. Section 702. In view of this statute, and that due process of law for the VPA was not revoked by the CSRA [neither was the Backpay Act], it is not necessary to create someother non-statutory appeal procedure.

In Bolker v. C.I.R., 760 F.2d 1039 (1985) the Court stated:

> "when review is necessary to prevent miscarriage of justice, or to preserve integrity of judicial process, ..., and when issue presented is purely one of law and either does not depend on factual record developed below or pertinent record has been fully developed; if one of the exceptions is applicable, Court of Appeals has discretion to address the issue."

In view of the finding in Bolker,, and their oath of office, the Court of Appeals should have reviewed the due process of law, for this case. The record had been fully developed for this petitioner's entitlement to due process of law. See Title 5 U.S.C. Sections 702 & 3502(c), Ms. Musick's affidavit, and the OSC's letter that they deferred to the agency's administrative procedures.

On October 13, 1994, the U.S. Congress passed Public Law 103-353, with some sections codified at Title 38 U.S.C. Chapter 43. Title 38 U.S.C. § 4324(b) permits veterans the right to appeal employment, re-employment, and retention rights directly to the MSPB. Could these appeal rights to the MSPB for veterans be retroactive to the creation of the MSPB in 1978? Congressional intent in 1978 was that the VPA was to be enforced. Did the 1978 Congress intend the Director, OPM to grant all veterans appeal rights to the MSPB, or did that Congress intend to permit the Director, OPM to split appeal rights for veterans between the MSPB under the CSRA and the District Court under the APA?

When agency's have descretion to grant, or not grant a veteran his entitlement to retention preference, and to place unqualified employees into any position, it is virtually impossible to prove reprisal. Hence, this petitioner foregoes discrimination and chooses to pursue appropriate relief and judicial review under the APA (or MSPB). Perhaps being unable to overcome agency discretion is the reason the OSC deferred to the agency without any meaningful investigation.

REASONS FOR GRANTING THE WRIT

Petitioner is entitled to judicial review for legal wrongs under the APA, and due process of law, guaranteed by the U.S. Constitution for his cognizable property right. This petitioner has been unjustly denied his property right without due process of law, and aggrieved by the defendant's legal wrongs, without judicial review. Petitioner prays that the Supreme Court GRANT this petition and determine if petitioner is entitled to due process of law for the property right, along with judicial review for the legal wrongs, and determine which Court or Board should provide the due process of law for this case

Respectfully submitted

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FILED
OCT 13, 1995
Clerk, U.S. District Court
Eastern District of California

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WORTHINGTON

v. CASE NUMBER: CIV S-94-1356 WBS/GGH

ROMINGER

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 10/13/95.

Jack L. Wagner,
Clerk of the Court

ENTERED: October 13, 1995

by: s/ NDD
NDD, DEPUTY CLERK

Exhibit 1

FILED
October 13, 1995
Clerk, U.S. District Court
Eastern District of California
By _____
Deputy Clerk

CLOSED
10/13/95

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

JAMES L. WORTHINGTON,

Plaintiff,

NO. CIV. S-94-1356
WBS\GGH

v.

MEMORANDUM AND ORDER

RICHARD ROMINGER, Acting Secretary, Department of Agriculture,

Defendant.

----oo0oo----

James Worthington brings this action against his former employer, the United States Forest Service ("USFS"). Worthington challenges his 1986 reassignment from the Tahoe National Forest to the Angeles National Forest. The parties cross-move for summary judgment.

I. BACKGROUND

In 1986, Worthington, a veteran, was employed by the USFS

and stationed in the Tahoe National Forest. Compl. ¶ 4. On October 26 of that year, he was reassigned to the Angeles National Forest. Id. Soon thereafter, Worthington filed several complaints with the Office of Special Counsel ("OSC"). Worthington v. Dept. of Agriculture, MSPB, DKT. No. SF122190W0305 at 2 (March 13, 1990) filed herein as Def. Ex. 1. In these complaints he challenged the reassignment, arguing that it (1) constituted sex discrimination; (2) was retaliation for protected EEO activity; and (3) was in violation of regulations pertaining to veteran's preference applicable to reduction in force ("RIF") procedures. Id.; Worthington v. Dept. of Agriculture, MSPB, DKT. No. SF03518810318 (May 8, 1988) filed herein as Def. Ex. 1; Dribinsky Letter of June 19, 1987 filed herein as Def.Ex.3.

By letter, the OSC deferred Worthington's allegations of discrimination and retaliation to the "discrimination complaint process in accordance with 5 C.F.R. § 1251.3." Def.Ex.3. As for Worthington's allegations that his "managers violated [his] retention rights as a veteran," the OSC responded as follows:

> The agency determined that you were qualified for a continuing position in another geographical location for which they had been unsuccessful in filling through other means. It appears that the agency acted within its discretionary authority to reassign you to meet a legitimate need to fill that position without having to use the reduction-in-force (RIF) procedures. The provisions of 5 U.S.C. §§ 3502 and 3503 [pertaining to veteran's retention preferences] are incorporated in the implementing regulations established by the Office of Personnel Management in 5 C.F.R., part 351. Since RIF procedures were not used, the agency did not have to consider your retention standing in making the decision to reassign you. Further we found no evidence of any other prohibited personnel practice or of any violation of law, rule, or regulation within our investigative jurisdiction.

Def.Ex.3,

On appeal to the MSPB, the Administrative Law Judge found that Worthington's reassignment was not pursuant to a RIF, and that therefore the MSPB did not have jurisdiction over his appeal. Def. Ex.1. Worthington then appealed this decision to the Court of Appeals for the Federal Circuit, which agreed that his reassignment was not made pursudant to a RIF, and affirmed the Board's decision. Worthington v. Dept. of Agriculture, 37 M.S.P.R. 485, 1988 WL 131525 (Fed.Cir.).

Worthington's claim under Title VII, that the reassignment was the result of discrimination or retaliation, was tried before this court in September 1994, and judgment was entered for defendant on November 3, 1984. On August 26, 1994, Worthington filed this complaint, his fourth against the Forest Service in this court,[1] seeking review of his reassignment under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 703. He argues that the reassignment was arbitrary and capricious and an abuse of agency discretion. He specifically maintains that others were retained instead of him in violation of his right to a veterans' preference under 5 U.S.C. § 3502, and that the reassignment otherwise violated agency rules and regulations for a number of reasons.

III. ANALYSIS

Defendant moves for summary judgment on three separate grounds. Defendant argues first that the Civil Service Reform Act precludes judicial review of Worthington's claim under the Administrative Procedure Act ("APA"); second, that Worthington's claim is barred by the applicable statute of

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[1] The first suit filed by Worthington, Civ.S. No 92-1020, alleged that the 1986 reassignmentwas retaliation for his having filed EEO complaints alleging race and sex discrimination. The second, Civ.S.No. 93-868, was based on Worthington's 1990 termination from the Forestry Service. Thee claims were consolidated and tried before this court in September 1994, and as noted above, judgment was entered for defendant. In his third suit, Civ.S.No. 93-868, Worthington sought to challenge his performance evaluations, and the duties to which he had been assigned. Summary judgment was entered for defendant on this claim on June 28, 1994.

limitations; and third, that his claim is barred by the doctrines of res judicata and collateral estoppel. As the court finds merit in at least two of these arguments, defendant's motion will be granted.[2]

A. The Civil Service Reform Act of 1978

The Civil Service Reform Act ("CSRA"), codified at various parts of Title 5 of the United States Code, is a comprehensive remedial scheme available to employees of the federal government. The CSRA provides an elaborate framework for evaluating adverse personnel actions taken against federal employees, and it "prescribes in great detail the protections and remedies applicable to such action[s], including the availability of administrative and judicial review." United States v. Fausto, 484 U.S. 439, 443 (1988). "Congress enacted the CSRA to replace 'an outdated patchwork of statutes and rules built up over almost a century.'" Saul v. United States, 928 F.2d 829, 833 (9th Cir. 1991) quoting S.Rep. No. 969, 95th Cong., 2d Sess. 3, 53 (1978) reprinted in 1978 U.S. Code Cong. & Admin. New 2723, 2725 (Senate Report). The CSRA "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." Fausto, 484 U.S. at 445.

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[2] In plaintiff's motion for summary judgment he asks the court to rule on the merits of his arguments. However, since the court finds (1) that judicial review under the APA is precluded by the CSRA, and (2) that plaintiff's claims are barred by the statute of limitations, it does not reach plaintiff's arguments, and his motion will be denied. Defendant also asks the court to grant summary judgment on the grounds that plaintiff has failed to comply with this court's earlier order to pay costs arising from his prior action that was tried in September 1994. As the court grants defendant's motion on the merits, it is unnecessary to consider this argument. Moreover, because the court is not ruling against plaintiff because of his failure to pay the assessed costs, it is unnecessary to consider plaintiff's request for a one-week extension to pay the amount due.

One element of this new framework in the primacy of the Merit Systems Protection Board ("MSPB") and the United States Court of Appeals for the Federal Circuit. Id. at 449. By funnelling work-related complaints brought by federal employees into the MSPB and the Federal Circuit, the CSRA [1] provides for the development "of a unitary and consistent Executive Branch position on matters involving personnel action, [2] avoids an 'unnecessary layer of judicial review' in lower federal courts, and [3] 'encourages more consistent judicial decisions.'" Id., quoting S.Rep. No 95-969, at 52, U.S. Code Cong. & Admin. News 1978, p.2772.

Defendant argues that this exhaustive and comprehensive framework precludes federal employees from challenging employment decisions under the APA. There is overwhelming authority supporting defendant's position.[3]

In Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984), for example, a career employee with the Social Security Administration sought review of his performance evaluation in federal district court under the APA. As in the instant case, Veit argued that review under the APA was appropriate because the CSRA did not provide a remedy for the injury he had suffered. The Ninth Circuit rejected this argument. It first noted that the "CSRA provides a comprehensive scheme for administrative and judicial review of federal personnel actions and practices." Id. at 510. The court then concluded that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." Id. at 511.

Plaintiff argues that his case is distinguishable because it involves a reassignment and because he is entitled to a veteran's preference. However, courts have reached the same decision in cases involving reassignments, and in cases involving veterans' and other preference. In Ryon v.O'Neill, 894 F.2d 199 (6th Cir. 1990), an employee of the Department of Defense sought review

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[3] The exceptions to this rule are claims alleging discrimination under Title VII, the ADEA and the Fair Labor Standards Act. 5 U.S.C. 7703(b)(2).

in district court of his reassignment to the United States from his earlier, and preferred, assignment in South Korea. One of his arguments was that the reassignment was properly reviewable in district court under the APA. The court rejected this argument after a lengthy analysis, concluding:

> In short, the text of the CSRA, the structure of review it establishes, and the legislative history of the Act, all lead ineludibly to the conclusion that Congress intended review of agency reassignment decisions to be confined to the specific procedures set out in the text of the CSRA.

Id., 894 F.2d at 204; see also Weatherford v.Dole, 763 F.2d 392 (10th Cir. 1985) (no APA review of federal employee's reassignment); Carducci v. Regan, 714 F.2d 171 (D.C. Cir.1983)(same); Broadway v. Block, 694 F.2d 979, 986 (5th Cir.1982) (same).

In another case, Stephens v. Department of Health and Human Serv., 901 F.2d 1571 (11th Cir. 1990), an attorney sought judicial review under the APA after he was rejected for a promotion. Like Worthington, Stephens premised his action on a perceived entitlement to a veteran's preference. The court cited Veit v. Heckler, and held that "the CSRA was now the exclusive remedy remedy of the federal employee. . . . [both] preference-eligible as well as non-preference employees." Stephens, 901 F.2d at 1575. See also Ryon, 894 F.2d at 200, 203 (in case involving preference eligible employee court held that the "CSRA not only contains no implied right of action, but also evinces Congress' intention to preclude direct appeal under' the APA).

These cases are further supported by another consideration. It is a central structural element of the CSRA to provide a "preferred position" to federal employees who are also "veterans." United States v. Fausto, 484 U.S. 439, 449 (1988). Thus, unlike nonpreference eligible employees, veterans, and other preference eligible employees, have a wide range of remedies under the CSRA. Id. In Fausto, the Supreme Court

held that the CSRA precluded judicial review under the Tucker Act in an action brought by a nonpreference employee seeking to recover under the Back Pay Act. Fausto argued that the CSRA could not preclude review under the Tucker Act because the CSRA did not provide him, as a non-preference employee, with a remedy for his injury. The Supreme Court found that the CSRA precluded Fausto's claim despite the fact that it offered few remedies for nonpreferenced employees. It follows, a fortiori, that if preclusion is warranted in cases where the CSRA provides no remedy, there is an even stronger argument for preclusion for which the CSRA prescribes extensive and comprehensive remedies. See 5 U.S.C. §§ 2302 (a)(2)(A)(iv) and 2302(b)(11).

Worthington claims he has no remedy under the CSRA because the CSRA does not provide for review of a reassignment unless it is also accompanied by a reduction in pay or grade. But as Fausto instructs, the fact that the CSRA does not provide a remedy is irrevelant to the question of preclusion. The lesson of Fausto is that if the remedy is not provided by the CSRA, then Congress intended that there be no remedy. The fact that some slights might go unremedied is simply part of the balance Congress struck between "the legitimate interests of various categories of federal employees [and] the needs of sound and efficient administration." Fausto, 484 U.S. at 445. Moreover, the only reason Worthington had no remedy under the CSRA was because the OSC, the ALJ, and the Court of Appeal for the Federal Circuit all concluded that his reassignment was not pursuant to an RIF, and that therefore he had no veterans' preference to retain his position.

In short, the overwhelming weight of authority holds that the CSRA precludes APA review of challenged federal employment actions. Indeed, the court is aware of only one appellate court to have come out the other way. In Dugan v. Ramsay, 727 F.2d 192, 194 (1st Cir. 1984), then Judge Breyer ruled that the CSRA did not preclude judicial review under the APA. However, Dugan has not been followed outside of the First Circuit, and the arguments it relied on were addressed and rejected by the

Supreme Court in Fausto. See Fausto, 484 U.S. at 452-455. Thus, it is doubtful that Dugan remains good law--even in the First Circuit.

B. Statute of Limitations

Defendant also argues that even if APA review is not precluded Worthington's claim is time-barred. Claims for judicial review of agency action brought pursuant to the APA are governed by the six-year statute of limitations applicable to claims against the federal government, 28 U.S.C. § 2401(a). Wind River Min.Corp. v. United States, 946 F.2d 710, 712 (9th Cir. 1991).

The question posed in when Worthington's claim for review under the APA accrued. Generally, "under federal law, the touchstone for determining the commencement of the limitations period is notice: 'a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" Hoesterey v. City of Cathedral City, 945 F.2d 317, 319 (9th Cir. 1991) quoting Cline v. Brusset, 661 F.2d 108, 110 (9th Cir. 1981). As alleged in his complaint, Worthington had notice of his injury, the allegedly wrongful reassignment,on September 8, 1986. Compl. ¶ 4 and Ex. 1. He filed suit on August 26, 1994, almost eight years later.

Worthington, however, insists that his claim did not accrue until after he had fully exhausted his administrative remedies. This occurred, at the latest, on December 12, 1988, when the Court of Appeals for the Federal Circuit upheld the MSPB's decision regarding Worthington's reassignment claim based on a wrongful denial of a veterans' preference.[4] Measured from this date, his complaint is timely filed.

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[4] The court rejects Worthington's suggestion that the pertinent exhaustion date is March 5, 1991, when the agency issued its final decision finding that Worthington had not been discriminated against. Pl.Ex.1. While this date may have been pertinent to a determination of when Worthington's Title VII action accrued, it is not pertinent to this action, which includes no claims of discrimination.

There is some support for plaintiff's position. In Wind River, 946 F.2d 710, a mining company sought judicial review of a 1979 Bureau of Land Management ("BLM") decision foreclosing certain lands from mining activites. In 1985, the company filed valid mining claims to the protected lands. In 1986 and 1987 it attempted to have the BLM rescind its 1979 decision. A final decision upholdingthe agency's refusal to revoke the 1979 decision was issued by the Interior Board of Land Appeals ("ILBA") on May 7, 1987. The company filed suit in federal court on September 22, 1989 seeking review of the IBLA's decision. The court concluded that the agency's final decision was made on May 7, 1987, when the company's appeal was dismissed, and that the company's claim accrued on that date.

Wind River is distinguishable from this case and, therefore, it does not justify disregarding the general rule that a claim accrues when the plaintiff has notice of injury. The most significant difference is that the plaintiff in Wind River was asking the court to review the decision of the IBLA. Since the court could not review the decision until it was made, it would make little sense for the claim for review to accrue before that time.

Worthington does not ask the court to review the decision of the Federal Ciruit, nor could he; a district court cannot sit in review of a Court of Appeal. Rather, he asks the court to review the agency's decision to reassign him. "The right to bring a civil suit challenging an agency action accrues' upon the completion of the administrative proceedings.'" Wind River, 946 F.2d at 714. The administrative proceedings challenged here is defendant's decision to reassign Worthington. This proceeding was complete when Worthington received notice of his reassignment on September 8, 1986. It was at this time that he had notice of the injury that forms the basis for his claim for review.

Finally, Worthington argues that this present complaint should "relate back" to August 1992, when his discrimination complaint was filed. Some six weeks before the trial of Worthington's discrimination suit was set to begin, Worthington filed a motion seeking to amend his complaint to add the claims

he raises in this suit. Before the court could rule on his motion, Worthington instead opted to file these claims as a separate trial. The "relation back" doctrine does not apply in such circumstances. See Fed.R.Civ.P. 15(c); Lewellen v. Morley, 875 F.2d 118, 122 n. (7th Cir. 1989) ("one timely filing does not authorize a string of subsequent suits").

C. Res Judicata

Finally, defendant argues that Worthington's claim is barred by the doctrine of res judicata. The court agrees, in part. Plaintiff's complaint challenges the 1986 reassignment on grounds other than discrimination.[5] He makes essentially two arguments. The first is that the agency was undergoing a reduction in force when they reassigned him, and that therefore, he was entitled to a veteran's retention preference. Rather than giving him the preference, defendant instead wrongfully retained other nonpreference eligible employees in place of Worthington. Compl. ¶ 6. His second argument, or to be more precise, series of arguments, is that his reassignment otherwise violated agency policy and regulations in four different ways.[6]

There are two prior actions relevant to the question of whether Worthington's claims are precluded. The first is Worthington's discrimination action which was tried in this court in September 1994. The second is the administrative proceedings brought by Worthington to challenge his reassignment on grounds other than discrimination.

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[5] To the extent that he challenged the reassignment on groungs of discrimination, his claim was decided in the trial before this court conducted in September 1994.

[6] Worthington alleges that his reassignment violated agency policy because (1) he was unqualified for this new position; (2) the position to which he was reassigned had not been reclassified; (3) his employee evaluations were not sufficient to justify his promotion to a position with a higher grade; and (4) there were qualified female workers who should have been promoted ahead of his pursuant to a consent decree binding on the agency.

1. Worthington's Discrimination Suit

Defendant first argues that the judgment from Worthington's discrimination suit bars both arguments raised in the present action because the earlier discrimination suit also concerned his reassignment to the Angeles National Forest. "The doctrine of res judicata bars 'all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties. . . . on the same cause of action, if the prior suit concluded in a final judgment on the merits.'" International Union v. Karr, 994 F.2d 1426, 1429 (9th Cir. 1993). About six weeks before his discrimination suit went to trial, Worthington moved to amend his complaint to add the legal theories he is now pursuing in this suit. Defendant opposed the amendment. Before the court could decide the motion, Worthington filed the present complaint. The court then dismissed his motion to amend as moot, and the discrimination suit proceeded without the arguments now raised.

There seems little question but that Worthington's claims here could have been efficiently resolved in the prior suit. All involved the same injury, and all arose from the same series of events. See Karr, 994 F.2d at 1429. Defendant is correct in arguing that res judicata generally prevents claim splitting. See Haphey v. Linn County, 924 F.2d 1512, 1517 (th Cir. 1991). However, Worthington attempted to amend the complaint in the earlier suit to include the legal theories he now advances. Defendant opposed the amendment at that time. In so doing defendant waived the right to argue that the discrimination suit would have any res judicata effect on this suit. See Calderon Rosado v. General Elec. Circuit Breakers, Inc., 805 f.2d 1085 (1st Cir. 1986).

2. Administrative Proceedings

Defendant next argues that Worthington should be precluded from raising his veteran's preference argument on the ground

that it was already adjudicated by the MSPB and affirmed by the Federal Circuit.

Res Judicata bars Worthington's claims to the extent that he wishes to base his arguments on an entitlement to a veteran's preference. This argument was directly considered by the OSC, the MSPB, and the Federal Circuit. Each concluded that the reassignment was not made pursuant to a RIF, and that therefore Worthington was not entitled to challenge it on the basis of his status as a veteran. Def.Ex.3 ("Since RIF procedures were not used, the agency did not have to consider your retention standing in making the decision to reassign you."); Def. Ex.1 ("The record documents further show that the reassignment was not pursuant to a RIF. . ."); Def.Ex.2 ("evidence in support of [the MSPB's] finding is substantial").

The same cannot be said, however, for his other arguments. Both the MSPB and Federal Circuit held that the fact that Worthington's demotion and reassignment did not implicate his veteran's preference rights deprived them of jurisdiction over his appeal. Thus neither opinion addresses Worthington's further arguments that his reassignment was in contravention of agency policy, rules and regulations. Accordingly, the court cannot finds that Worthington's claim is barred by res judicata to the extent it relies on these arguments.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be, and the same hereby is, GRANTED. Plaintiff's motion for summary judgment is hereby DENIED.

DATED: October 11, 1995

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

Filed
July 15, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

JAMES L. WORTHINGTON,)	No. 95-17208
)	
Plaintiff-Appellant,)	D.C. No. CV-94-01356
)	WBS
v.)	
)	
DANIEL GLICKMAN*,)	MEMORANDUM**
Secretary, U.S. Department of)	
Agriculture,)	
Defendant-Appellee.)	
)	

Appeal from the United States District Court for the Eastern District of California William B. Shubb, District Judge, presiding
Submitted July 9, 1996***

Before: HUG, Chief Judge, SCHROEDER, and POOLE, Circuit Judges.

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* We hereby order substitution of the defendant in the district court, Richard Rominger, Acting Secretary of Agriculture, for Daniel Glickman, his successor. See Red. R. App. P. 43(c)(1).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Exhibit 2

James L. Worthington appeals pro se the district court's summary judgment in favor of the Secretary of Agriculture in Worthington's action under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 et seq., challenging the decision of the United States Forest Service, his former employer, to reassign him from the Tahoe National Forest to the Angeles National Forest. Worthington contends his reassignment violated his preferential retention status as a veteran pursuant to 5 U.S.C. § 3502, several other agency policies[1/], and his Fifth Amendment right to due process. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review de novo a grant of summary judgment. See Saul v. United States, 928 F.2d 829, 832 (9th Cir. 1991).

"The [Civil Service Reform Act ("CSRA")] is the exclusive remedy for all prohibited personnel actions." Brock v. United States, 64 F.3d 1421, 1425 (9th Cir. 1995) (citing Viet v. Heckler, 746 F.2d 508, 510 (9th Cir. 1984)). A "prohibited personnel action" includes a reassignment, 5 U.S.C. 2302(a)(2)(A)(iv), taken in violation of the CSRA'a merit system principles, 5 U.S.C. § 2302(b)(11); See Saul, 928 F.2d at 833.

Worthington's claims that his reassignment violated his preferential retention status and other agency policies constitute allegations of prohibited personnel actions under the CSRA. See 5 U.S.C. §§ 2302(a)(2)(A)(iv), 2302(b)(11); Saul, 928 F.2d at 833. Accordingly, the CSRA precludes judicial review of his claims.[2/] See Saul, 928 F.2d at 833-34; cf. Brock, 64 F.3d at 1425.

[1/] In his complaint Worthington alleged his reassignment violated agency policy because (1) he was unqualified for his new position; (2) his performance evaluations were insufficient to justify his promotion to a position with higher grade; (3) his new position was not reclassified; and, (4) there were qualified female workers who should have been promoted ahead of him pursuant to a consent decree binding on the agency.

[2/] Worthington's contention that he should be eligible for relief under the APA because the CSRA does not provide him with means of challenging an alleged wrongful reassignment not pursuant to a reduction in force lacks merit. See United States v. Fausto, 484 U.S. 439, 449 (1988) (holding CSRA precludes judicial review of nonpreference eligible employee's

We do not consider Worthington's contention that his reassignment violated his right to due process because it is raised for the first time on appeal. See Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985).

Furthermore, Worthington's contention that his reassignment was pursuant to a reduction in force ("RIF"), which would entitle him to preferential retention as a veteran, see 5 U.S.C. § 3502(b), is barred by res judicata because he has already litigated his claims that his reassignment was pursuant to a RIF, see Worthington v. Dep't of Agric., 865 F.2d 268 (table) (per curiam) (Fed.Cir. 1988). See Springs v. First Nat'l Bank of Cut Bank, 835 F.2d 1293, 1296, (9th Cir. 1988). Likewise Worthington's claim based upon the failure of the Office of Special Counsel to investigate his claim of retaliation is barred by res judicata because he could have raised the claim in his previous lawsuit, Worthington v. Espy, No. CIV S-92-1020-WBS/GGH (E.D. Cal.Nov 3, 1994), appeal dismissed, No. 94-16988 (9th Cir. Apr. 7, 1995), where he argued that he was reassigned as retaliation for his discrimination complaints, see Springs, 835 F.2d at 1296.

The defendant's motion to dismiss this action based on Worthington's failure to pay costs assessed in a previous action is denied without prejudice to his seeking an enforcement order for the costs in the district court.

AFFIRMED.

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challenge of adverse personnel action although the CSRA provided him with no remedy); see also Veit, 746 F.2d at 511 ("the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all.")

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Dec 18, 1996
CATHY A CATTERSON,
CLERK, U.S. COURT
OF APPEALS

JAMES L. WORTHINGTON	No. 95-17208
Plaintiff-Appellant,	D.C. No. CV-94-01356-WBS
v.	Eastern California (Sacramento)
DANIEL GLICKMAN* Secretary, U.S. Department of Agriculture	ORDER
Defendant-Appellee.	

Before: HUG, Chief Judge, SCHROEDER, and POOLE, Circuit Judges.

The petition for rehearing is denied.

* We hereby order substitution of the defendant in the district court, Richard Rominger, Acting Secretary of Agriculture, for Daniel Glickman, his successor. See Fed. R. App. P. 43(c)(1).

Exhibit 3

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE REGION
PACIFIC SOUTHWEST REGIONAL OFFICE
630 SANSOME ST
SAN FRANCISCO, CA
94111

REPLY TO: 6170 Personnel Relations

Date: Sep 08, 1986

SUBJECT: Directed Reassignment

TO: James L. Worthington
Thru Forest Supervisor, Tahoe National Forest

PERSONAL

Because the Forest Service is undergoing extensive cutbacks, we are faced with a situation where some employees are in unfunded positions, while funded positions are vacant elsewhere in the Forest Service. Your Forest has informed you that your position is unfunded. We have now found an opportunity to reassign you to a funded vacancy. You are a valued employee of the Forest Service and we want to take advantage of this opportunity.

Therefore, in accordance with 5 CFR 335.102, I am directing your reassignment from your current unfunded Civil Engineering Technician, GS-802-7 position on the Sierraville Ranger District, Tahoe National Forest to the vacant Civil Engineering Technician, GS-802-9 position in the Supervisor's Office, Angeles National Forest, Arcadia, California, effective October 12, 1986. Failure to report for duty on the first regularly scheduled workday following this effective date (i.e. on Tuesday October 14, 1986) will be recorded as absence without leave (AWOL) and may result in a proposal to remove you from your

Exhibit 4

position in the Forest Service. Because this new position is outside of your present commuting area, if you decline this offer and are removed, you will be entitled to severance pay or discontinued service retirement, depending on your tenure.

Please advise the Regional Personnel Officer of your decision no later than seven (7) calender days after receiving this letter by completing and returning the enclosed copy of this letter. Please don't hesitate to call on your supervisor or Forest Personnel Office for assistance. We sincerely hope you will accept this reassignfment.

/s/ Zane G. Smith Jr.
ZANE G. SMITH, JR.
Regional Forester

Enclosure

__ I accept this reassignment and will report for duty as directed.

__ I decline this offer. If removed, I wish to accept severance pay/discontinued service retirement, depending on my eligibility.

SIGNATURE:_____ DATE: _____

AFFIDAVIT

STATE OF California
County of Nevada

I Geri (Larson) Bergen , No Prior EEO Activity,
(Affiant's Name) (Affiant's sex, Race, Etc.)

Forest Supervisor, GM-460-14. Tahoe N.F. ,.
(title, series, grade, organization)

make the following statement freely and voluntarily to Robert K. Vukovic, who has identified him/herself to me as an EEO Contract Investigator for the following federal agency: U.S. Dept. of Agriculture, knowing that this statement may be used in evidence. I understand that this statement is not confidential and may be shown to any interested party. I HEREBY SOLEMNLY swear that I have held my current position since January 1985. I was the Deputy Forest Supervisor from 1978 until 1985. I first became aware that James Worthington was involved in EEO activity at the time he filed his first formal complaint in September 1984.

As a result of a decreased need for engineering services and related decrease in funding, Jim's position on the Sierraville Ranger District became unfunded during late fall, 1985. There was not sufficient work to justify retaining Jim on the Sierraville District so he was temporarily reassigned to the Supervisor's office pending a permanent reassignment or some other appropriate action depending on the circumstances.

Our primary efforts were to indentify available and suitable positions to which Jim and employees also in unfunded positions could be reassigned. We preferred to place all excess employees as opposed to resorting to a reduction in force. There were excess personnel regionwide so the region developed a clearinghouse in an attempt to place employees servicewide. There was a regional directive to exhaust all placement efforts before a reduction in force would be considered.

Exhibit 5

As I recall, I attended a regional management team meeting during early 1986 and had a conversation with the former deputy Angeles N.F. Supervisor, Hank Hazen. He indicated that the Angeles had been unable to fill at least one engineering technician position through merit promotion due to a lack of applicants. I contacted Tom Dooley, Angeles Forest Engineer, and told him I had an available and qualified engineering technician. I did inform Tom as to the nature of the performance/conduct problems we had experienced with Jim. My Deputy, Frank Waldo, also had some conversations with Tom Dooley concerning the possibility of reassigning Jim to the Angeles.

At some point the Angeles agreed to accept Jim on a directed reassignment. I recommended this and the region processed the necessary paperwork for the signature of the Regional Forester.

Entering into a reduction in force was not necessary due to the alternative procedures that were used to place excess people. Reduction in force is an undesireable process as it affects numerous people due to bumping rights, etc..

There was a definite agency need in Jim's reassignment. We were obligated to make every effort to place Jim and the Angeles had an available and sutiable position.

Jim's prior EEO activity was not a factor in his reassignment. It was in accordance with established procedures and applicable regulations to the best of my knowledge.

Jim was not the only employee affected by the reorganization. We had two additional directed reassignments as well as having employees who took voluntary reassignments and early outs.

At the time the position on the Angeles was our only alternative for placing Jim. The placement was made in good faith with no regard to unrelated factors.

We are still going through cutbacks in our engineering workforce. Jim's position on the Sierraville District has been abolished and one of the remaining engineering technicians, Jon Fint has had supplemental Forester's duties assigned in addition to his engineering responsibilites.

A side benefit to the reassignment was that it gave Jim the opportunity to start over under new supervison in a new environment. This wasn't the reason for his reassignment but it did provide that benefit.

I HAVE READ THE ABOVE STATEMENT CONSISTING OF 5 PAGES, AND IT IS TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT THE INFORMATION I HAVE GIVEN IS NOT TO BE CONSIDERED CONFIDENTIAL AND THAT IT MAY BE SHOWN TO THE INTERESTED PARTIES.

/S/Geri v. Bergen
AFFIANT'S SIGNATURE

SUBSCRIBED AND SWORN TO
BEFORE ME AT NEVADA CITY,
CALIF ON THIS 23 DAY OF
JUNE, 1989.
/S/ ROBERT K. VUKOVIC
ROBERT K. VUKOVIC
INVESTIGATOR

Office of the Special Counsel
U.S. Merit Systems Protection Board
1120 Vermont Avenue, N.W. Suite 1100
Washington, D.C. 20005

Jun 19, 1987

Mr. James L. Worthington
P.O. Box 3141
Arcadia, California 91006

Re: OSC File No. 10-7-00602

Dear Mr. Worthington:

This letter responds to the complaint that you submitted to the Office of the Special Counsel. You alleged that management officials of the Forest Service demoted you in 1985 and reassigned you from Tahoe National Forest to Angeles National Forest in 1986 as reprisals for your exercising your appeal rights. Also you alleged that these managers violated your retention rights as a veteran, and requested that the Special Counsel seek a retroactive stay of your reassignment from the Merit Systems Protection Board.

We have carefully reviewed and analyzed your complaint along with information included in your previous complaint (OSC File 10-7-00118) in which you also alleged that your reassignment was a reprisal for your exercising an appeal right. We reiterate our decision, as outlined in our letter to you of January 27, 1987 in response to your first complaint, to defer your allegation of reprisal for filling EEO complaints to the discrimination complaint process in accordance with 5 C.F.R.

Exhibit 6

Sec. 1251.3. Although you would prefer that we assert investigative jurisdiction in this matter, we have determined that to do so would be a duplication of the EEO process. Therefore we will take no further action on your allegation of reprisal for filing discrimination complaints.

We found no evidence indicating that reprisal for appealing your demotion was the reason you were reassigned to your current position. The agency determined that you were qualified for a continuing position in another geographical location for which they had been unsuccessful in filling through other recruitment means. It appears that the agency acted within its discretionary authority to reassign you to meet a legitimate need to fill that position without having to use reduction-in-force (RIF) procedures. The provisions of 5 U.S.C. secs. 3502 and 3503 are incorporated in the implementing regulations established by the Office of Personnel Management in 5 C.F.R., part 351. Since RIF procedures were not used, the agency did not have to consider your retention standing in making the decision to reassign you. Further we found no evidence of any other prohibited personnel practice or of any violation of law, rule or regulation within our investigative jurisdiction. Tfherefore we decided not to seek a stay of your reassignment from the Merit Systems Protection Board.

Accordingly we plan no further action and have closed our file in this matter. This letter should not be construed as an adjudication of any matter you may have pending or plan to file under any administrative appeal.

Sincerely,

/s/ Leonard M. Dribinsky
Leonard M. Dribinsky
Assistant Special
Counsel for Prosecution

LMD/RBE/AW/aw

Having been duly sworn under oath, I Diane Musick certify that the following is true and correct to the best of my knowledge:

1. I am female.

2. I have never served in the Armed Forces of the United States and therefor I am not a preference eligible person.

3. I was employed by the Tahoe National Forest in the competitive service between 1969 and 1994.

4. My performance evaluations in 1984, 1985, and 1986, were fully successful (level 3) or better.

5. To the best of my knowledge, the Forest Service did not offer me the position on the Angeles National Forest that Mr. Worthington was reassigned to.

6. My occupational series for the Tahoe National Forest was Civil Engineering Technician GS-802.

7. I retired from the Forest Service in 1994 as a GS-802-7.

DATE: 4/26/95

/s/ Diane Musick
Diane Musick

Notorized by Joy S. Duncan
Comm. # 1025968
Nevada County, Calif.

Exhibit 7